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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSISSIPPI, *Appellant*,

v.

WILLIAM FRENCH SMITH, *Appellee*.

On Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether retrogression in a legislatively enacted redistricting plan, in accordance with *Beer*, is measured against minority voting strength as it exists at the time of the enactment?

II. Whether the prior precleared enactment serves as the benchmark for analyzing retrogressive effect under Section 5, where the legislature has enacted a new redistricting plan in reliance on the prior preclearance?

III. Whether Section 5 of the Voting Rights Act authorizes federal scrutiny of State voting standards, practices, and procedures beyond the temporal boundaries of the change which necessitated federal review?

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JURISDICTIONAL STATEMENT

OPINION BELOW

The June 28, 1982 Memorandum Opinion and Order of the Court, entered in *Mississippi* v. *Smith*, Civil No. 82-0956, by the two participating members of the three-judge district court for the District of Columbia is set forth in the accompanying Appendix A.[1]

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[1] The Court consisted of United States Circuit Judge, J. Skelly Wright, United States District Judge, Gerhardt Gesell, and United States District Judge, Charles Richey. Judge Richey was not present at oral argument and took no part in the court's decision. *See* App. at 1a.

JURISDICTION

On April 7, 1982, Appellant, the State of Mississippi, filed a complaint for a declaratory judgment that its legislatively-enacted Congressional redistricting plan, S.B. 2001, did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race, in the United States District Court for the District of Columbia, invoking the exclusive jurisdiction of that Court pursuant to 42 U.S.C. § 1973c. A statutory three-judge court was convened in accordance with 42 U.S.C. § 1973c and 28 U.S.C. § 2284(a).

The State filed a motion for summary judgment on the issue of discriminatory effect and a motion in limine to limit the scope of the evidence pertaining to purpose. The State herein appeals from the district court's denial of the State's motion for summary judgment on the issue of effect. Jurisdiction is conferred on this Court by 42 U.S.C. § 1973c to hear any appeal from an action under 42 U.S.C. § 1973c. *N.A.A.C.P.* v. *New York*, 413 U.S. 345, 353-56 (1973).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, and Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c are set forth in Appendix B.

STATEMENT OF THE CASE

This interlocutory appeal arises from an action for declaratory judgment under Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) as to Mississippi's 1981 Congressional redistricting plan, S.B. 2001. Some historical background is necessary to an understanding of the issues raised by this appeal.

The 1960 census results reduced Mississippi's number of Congressional representatives from 6 to 5. During its regular session in 1962 the Legislature enacted a reapportionment which merely collapsed the old Second and Third districts into one new district. The result was a grossly malapportioned plan with an overall deviation of nearly a full district size.

On October 19, 1965 the Mississippi Freedom Democratic Party and other plaintiffs instituted an action in the Federal District Court for Southern District of Mississippi for an apportionment on a strict population basis. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966). Before the case came on for a hearing, the Legislature enacted H.B. 911 which achieved an acceptable population deviation. On July 12, 1966 the plaintiffs amended their complaint to challenge H.B. 911 on the grounds that it had the purpose, intent and effect of denying blacks a fair opportunity to vote and elect representatives of their choice.

On September 30, 1966, an opinion issued in which the three-judge panel made specific findings that the plaintiffs failed to prove either the intent or effect of discrimination. 276 F. Supp. at 623-24. The plaintiffs took an appeal to the Supreme Court of the United States and the judgment of the district court was summarily affirmed. *Connor* v. *Johnson*, 386 U.S. 483 (1967).

In 1972, the Legislature enacted a Congressional plan, which was essentially identical to the 1966 configuration. Miss. Code Ann. § 23-5-223 (1972). It deviated from the 1966 lines only where necessary to achieve population equality. The State submitted the 1972 redistricting to the Attorney General for preclearance under Section 5. By letter dated May 30, 1972 Assistant Attorney General David Norman informed the State that he would interpose no objection to the new plan. Appendix C. These

1972 Congressional districts were in place for 5 elections and were never challenged.

During its regular 1980 session, in anticipation of the 1980 census and the need for legislation to bring the State's five Congressional districts into compliance with the constitutional requirements of population equality, the Mississippi Legislature established the standing Joint Congressional Redistricting Committee, [the "Committee"], Miss. Code Ann. §§ 5-3-121, *et seq.* (Supp. 1981). The Committee Staff began its work immediately so that legislation would be enacted and precleared well in advance of the June 1982 primary. As soon as the Census Bureau released the 1980 population data to the State, the Committee staff began to build an appropriate data base for use in drafting a plan to equalize the population disparity among districts reflected in the census data.

Mindful of its statutory obligation under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c to preclear all changes in voting standards, practices and procedures, the Committee retained special outside counsel to assure that the new legislation would meet Section 5 requirements. Throughout the first part of 1981, the Committee held eight public hearings in different locations across the state with at least one in each Congressional district. The hearings were announced in advance in print and electronic media, and were well attended. The Staff prepared computer analyses, including population deviation and racial composition information, for every plan advocated at the public hearings or proferred to the committee.

The meetings of the Committee were open to the public and the minutes were retained in the Committee's files. All maps, computer print-outs, census data as well as Committee minutes and public hearing records were

available for public inspection in the Committee office in Jackson. The State made every effort to encourage public participation and to assure an open process.

After the Committee reviewed and discussed the issues and proposals, and with the advice of counsel, the members recommended the adoption of S.B. 2001, which adhered to the same configuration as its predecessor 1972 and 1966 plans. (Maps of the three plans are provided in Appendix D.) The Legislature adopted this "least changes" approach to accommodate several goals, including preserving the electoral bases of the State's powerful incumbents, and achieving the lowest possible population deviation. Foremost among these goals, however, was adherence to the federal statutory and Constitutional standards which protect the voting rights of racial minorities. The prior determinations of the validity of the 1966-1972 configuration under the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act, guided the Committee and the Legislature and were certainly the most compelling reasons for the enactment of S.B. 2001.

On November 11, 1981, the State submitted S.B. 2001, together with all the information and materials itemized in the Department of Justice Regulations implementing Section 5, 28 C.F.R. §§ 51.25, *et seq.* On January 11, 1982, despite the State's unquestionable compliance with the submission requirements, the Attorney General, expressing his uncertainty as to the standard or benchmark to be used to measure retrogression—the barometer of discriminatory effect—requested more information. (This letter is included as Appendix E.) The State furnished data on prior redistrictings and attempted to elucidate its position that S.B. 2001 could not be said to retrogress since it enhanced black voting strength as compared to the previously precleared 1972 plan. On March 30,

1982, the Assistant Attorney General interposed an objection to S.B. 2001 stating that the State had not carried its burden of showing that the configuration adopted in 1966 had neither the purpose nor the effect of denying or abridging the right to vote on account of race.

On April 7, 1982, the State of Mississippi filed the action below seeking a declaratory judgment pursuant to 42 U.S.C. § 1973c. In order to resolve prior to trial the legal issue of what constitutes the benchmark against which to measure retrogression, the State moved for summary judgment on the issue of effect. The State argued that according to this Court's ruling in *Beer* v. *United States*, 425 U.S. 110 (1976), the benchmark is the existing voting strength of blacks as embodied in the current apportionment, in this instance the 1972 plan. Furthermore, the Appellants contended that since the 1972 plan had been precleared, it was no more than tautological for the State to assume that that plan met the requirements of the Voting Rights Act and that S.B. 2001 would be evaluated only insofar as it departed from the prior precleared enactment.

The Government argued that the benchmark should be November 1, 1964, the reference date by which the Act identifies which changes in voting will require preclearance.

While the State's Section 5 action was pending, the District Court for the Northern District of Mississippi heard the class action filed by black citizens of Mississippi to enjoin the elections under S.B. 2001 and to order interim relief in the form of a Congressional plan containing a 65% black district. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982). Since it was apparent that the Section 5 litigation would not be resolved in time to permit the use of S.B. 2001, the Mississippi district court

ordered into effect an interim plan for the 1982 elections. This decision is presently the subject of an appeal to this Court by the plaintiffs below, *Brooks* v. *Winter*, No. 82-233 and a cross-appeal taken by the State defendants, *Brooks* v. *Winters*, No. 82-413.

On June 28, 1982, the District of Columbia court denied the State's motion for summary judgment in the present case. The district court ruled that the benchmark by which to measure retrogressive effect should be the interim plan ordered by the local federal court, *or* the plan in effect on the effective date of the Voting Rights Act, whichever provides the higher benchmark. App. at 7a.

The decision of the court below denies the State any meaningful opportunity to adjudicate its rights under Section 5, by changing the controlling legal standards *after* the Legislature has acted in reliance on established principles. To fashion a rule of law which necessitates that the State prove conformance to a standard adopted subsequent to the formulation of the State's proof not only defies reason but insults the sovereignty of the State and emasculates the federal statutory mechanism for declaratory judgment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Resolution of the questions raised by this appeal is essential to consistency and procedural fairness in the enforcement of the preclearance provision of the Voting Rights Act. The Court below relied on the district court opinion in *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980), and the dissenting opinion on appeal to this Court, in ruling that an interim plan ordered by a local federal court, pending preclearance of the statutory plan, represents existing voting strength of minorities and must therefore, under

Beer, constitute the benchmark by which to measure retrogression. In *Mississippi* v. *United States*, however, the Section 5 court noted that the plan under consideration would not be considered retrogressive as compared to any of the proposed benchmarks. This Court affirmed without opinion. The dissenting opinion filed by Justice Marshall specifically agreed with the district court's choice of benchmark but disagreed with their conclusion. Justice Stevens, on the other hand, filed an opinion in which he took exception to the benchmark, but concurred in the result. The opinion of the majority of this Court on this fundamental issue remains unstated.

This aspect of Section 5 must be clarified in order to afford the State of Mississippi and all other states and subdivisions covered by Sections 4 and 5 of the Voting Rights Act a framework within which to make principled decisions in drafting redistricting legislation. If the ruling of the court below is permitted to stand, a Legislature enacting a new redistricting bill, will never be able to rely on a prior preclearance as a final determination of that precleared plan's compliance with Section 5. In addition, the legislative drafters will have to prophesize the exact racial composition of every possible district in any reapportionment plan which might be drafted and implemented on a temporary basis by a local district court in the future.

While the Section 5 remedy may be stringent and unprecedented in our federal system, nothing in the language of the Act suggests that Section 5 can be enforced capriciously to increase the burden on the covered states at the whim of the court or the Attorney General. The extraordinary nature of Section 5 notwithstanding, the federal court, and the Attorney General acting in its stead, must adhere to the fundamental principles of procedural fairness and res judicata.

I. Retrogression In A Legislatively Enacted Redistricting Plan, In Accordance With *Beer*, Must Be Measured Against Black Voting Strength, As It Exists At The Time Of The Enactment

In *Beer* v. *United States*, 425 U.S. 110 (1976), this Court defined the standards a reapportionment plan must meet to support a judgment that it does not have the effect of denying or abridging the right to vote on account of race. Citing the legislative history of the 1975 extension of the Voting Rights Act, the *Beer* Court stated that the "effect" portion of the Section 5 test was satisfied if the "ability of minority groups to participate in the political process and to elect their choices to office is "augmented or not affected by the change affecting voting." 425 U.S. at 141. "In other words the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their elective exercise of the electoral franchise." 425 U.S. at 141.

Beer translates the language of Section 5 into a workable standard which quantifies the concept of impermissible effect. If the electoral position of minorities is diminished by the change, if their status suffers or their existing strength is undercut, the new enactment has an effect which is impermissible.

The post-*Beer* decisions of this Court demonstrate that there has never been any doubt that existing voting strength as embodied in the prior enactment serves as the benchmark from which to measure retrogression. In *United Jewish Organizations* v. *Carey*, in considering whether the Fourteenth Amendment rights of the Hasidic Jewish community in Kings County had been violated

by an effort to realize black voting potential, this Court stated:

> Under *Beer* the acceptability of the New York 1972 reapportionment for purposes of § 5 depends on the change in non-white voting strength *in comparison with the previous apportionment*. 430 U.S. 144, 159 (1977). (emphasis added).

The complication which misled the court below was the intervening order of the District Court for the Northern District of Mississippi. *Jordan* v. *Winter*, 540 F. Supp. 1135 (N.D. Miss. 1982). The private plaintiffs filed that suit concurrently with the State's filing of this action below, immediately after the Attorney General interposed an objection to S.B. 2001, on March 30, 1982. The Mississippi district court labelled the plaintiffs remedial plan which contained a 65% black district, a blatant racial gerrymander, declined to implement S.B. 2001 on an interim basis pending preclearance, and ordered into effect the so-called Simpson plan which contains a 53.77% black district.[2]

The District of Columbia Court below reasoned that since the interim plan now represented *existing* black voting strength it must serve as the initial benchmark for evaluating the discriminatory effect, if any, of S.B. 2001. Whatever literal appeal this interpretation of the *Beer* standard may possess, it must be rejected as entirely illogical. The effect of the court's holding is to make it incumbent upon the Legislature to predict the statistical profile of every potential interim plan, in order to insure

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[2] The Simpson plan, which was considered by the Legislature in 1981 but ultimately rejected in favor of S.B. 2001, was advocated in *Jordan* by the State AFL-CIO, appearing as amicus curiae.

that their legislation will not be retrogressive under Section 5.

The district court reached this bizarre conclusion by allegiance to *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) *aff'd*, 444 U.S. 1050 (1980). In that case the district court made this finding:

> The settlement plan adopted by the *Connor* Court on April 13, 1979 must now be considered the pre-existing plan and the benchmark with which to compare the statutory plan. 490 F. Supp. at 582.

Mississippi v. *United States*, however, must be distinguished on several grounds. As the court noted, the statutory plan under review could not be said to retrogress from any of the proposed benchmarks. 490 F. Supp. at 582. Moreover, the plan chosen as a benchmark was the only single-member district plan available for comparison. Finally, the interim plan was a settlement plan in which the State acquiesced.

On appeal to this Court, the district court's judgment in *Mississippi* v. *U.S.* was affirmed without an opinion of the Majority. The dissenting and concurring opinions filed by Justice Marshall and Stevens, respectively, account for the views of only four members of the Court on the issue of whether an interim plan can serve as a benchmark even in the factually unique circumstances of that case. In any event, the resolution of the benchmark issue in that case was not, in the view of the majority, outcome determinative.

In the present case, the benchmark issue must be resolved prior to trial. The opinion of Justice Stevens enunciates the rule of law urged by the State:

> [T]o require a state legislature to predict what court-ordered plans may be entered while a Voting

> Rights Act suit is pending and then to draw its plan to ensure that no dilution occurs seems to me to be a futile exercise clearly not required by the statute.
>
> Thus, in my view the statutory plan was permissible under the Act so long as it did not have a discriminatory purpose and did not dilute black voting strength as it existed at the time the legislation was passed." 444 U.S. at 1052.

As a general rule the use of an interim plan as a benchmark places an intolerable burden on the Legislature. In this case, the result is particularly onerous. The openness of the legislative process, the retaining of outside counsel and the affirmative effort to encourage public participation bear witness to the State's good faith effort to comply with the substantive requirements of the Voting Rights Act. Moreover, the Legislature began the redistricting work even before the Census Bureau made the necessary data available. The State did everything possible to avoid a situation in which the preclearance of S.B. 2001 would be still pending on election day. The interim plan was implemented despite the State's diligent discharge of its statutory responsibilities, which included making a timely and complete submission to the Attorney General.

The unreasonableness of the district court's decision is further highlighted by the Department of Justice regulations governing Section 5 submissions. 28 C.F.R. § 51.25 *et seq.* All the relevant portions direct the state to provide information "adequate to disclose to the Attorney General the difference between the *prior and the proposed situation* with respect to voting." 28 C.F.R. § 51.25(b). (emphasis added). *See also* §§ 51.25(m), 51.25(o), 51.26(a)(1), 51.26(a)(2), 51.26(b)(1). The prior situation, voting strength as it exists at the time of enactment and the time of submission is the benchmark specified by the

Attorney General's own regulations. Surely the standard does not change merely because an interim plan is effectuated pending preclearance.

II. Where The Legislature Has Enacted A Redistricting Plan In Reliance On The Prior Precleared Enactment, The Prior Plan Serves As The Benchmark For Analyzing Retrogressive Effect Under Section 5

The court below not only designated the interim plan, implemented nearly a year after the enactment, as the benchmark against which to evaluate S.B. 2001, it further indicated that this was merely the *minimum* benchmark and that the State was also required to prove that S.B. 2001 does not retrogress from the "plan in effect on November 1, 1964." App. at 7a. The use of the effective date of the Act as a benchmark in cases where there has been an intervening preclearance is entirely without precedent. Insofar as S.B. 2001 preserves the configuration of the 1972 plan, the court's ruling runs counter to the principle of res judicata. In addition, the standard adopted by the district court expands the scope of their Section 5 jurisdiction, beyond the statutory authorization to review only *change* in voting standards, practices or procedures.

The 1972 plan represents black voting strength in Mississippi as it existed at the time of the enactment of S.B. 2001, and therefore should serve as the benchmark in evaluating the new districts. The court below, however, determined that their review should extend back to November 1, 1964 insofar as the existing districts had never been "reviewed on the merits" under Section 5.

App. at 7a.[3] To support this position, the court made the erroneous findings 1) that the Attorney General did not make a "factual determination" as to whether the redistricting plan met Section 5 requirements in 1972; and 2) that the State neglected an obligation to submit the plan enacted in 1966.

A. The statutory validity of a plan previously precleared cannot be relitigated in a subsequent declaratory judgment action under Section 5.

In 1972, the Mississippi Legislature enacted a redistricting scheme which was substantially the same as the previous (1966) plan. Based on their understanding that *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) encompassed reapportionment legislation among voting changes to be precleared under Section 5, the State leadership submitted the new plan to the Attorney General. By letter dated May 30, 1972, the Attorney General informed the State that he would interpose no objection to the redistricting statute based on "our read-

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[3] The district court made clearly erroneous assumptions of fact to martial support for their legal conclusions:

> It is very doubtful that an apportionment plan never reviewed on the merits under Section 5 and which, in fact, is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring possible discriminatory effect of subsequent plans. App. at 7a.

Neither the 1972 plan nor S.B. 2001 is "in fact retrogressive" as compared to the pre-Voting Rights Act standard. The black majority district which existed in 1964 would be 48.09% black today, due to the decrease in black population statewide, and in the Delta, particularly. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982). The Second district in S.B. 2001 has a black population of 47.95%. Unless 47.95% can be said to retrogress from 48.09%, the district court's assumption is erroneous.

ing of *Connor* v. *Johnson*, 279 F. Supp. 620 . . . in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state." App. at 13a. Whatever the motivation for the no-objection letter, when the 60 days elapsed, the 1972 plan was conclusively precleared and for purposes of Section 5 beyond challenge.

The essential facts in *Morris* v. *Gressette* are identical to the present case. 432 U.S. 490 (1977). The Attorney General had entered a no-objection ruling to South Carolina's legislative apportionment, because he felt constrained to defer to the prior determination of constitutionality made by the three-judge court in *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. April 7, 1972).

The *Morris* Court held that the Section 5 decisions of the Attorney General are not subject to judicial review. More to the point, the Court categorically stated that the Attorney General's reasons for objection or approval are immaterial to the efficacy of a preclearance once 60 days has elapsed:

> According to the terms of § 5, a covered jurisdiction is in compliance . . . once it has (i) filed a complete submission with the Attorney General and (ii) received no objection from that office within 60 days. . . . [I]mplementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General.
>
> 432 U.S. at 503.

The court below discredited the 1972 preclearance because in its view, the Attorney General did not make a "factual determination" as to whether the State had dem-

onstrated that the plan met Section 5 standards. App. at 4a. Section 5, however, does not differentiate between "factual" and "non-factual" determinations. Once the state has met its burden to submit and the Attorney General has declined to object, the enactment has been accorded the only review created by and required by the statute.

In *Morris* v. *Gressette*, this Court rejected the position adopted by the court below:

> "The record is clear that the Attorney General reviewed the submitted legislation as well as the judicial determination in *Twiggs* v. *West*, and decided not to interpose an objection . . . . That decision may have been erroneous, . . . but it nonetheless was a decision exercised pursuant to the Attorney General's § 5 responsibilities.
>
> 432 U.S. 507 at n. 24.

The Attorney General made a conclusive determination that Mississippi's 1972 Congressional redistricting statute met Section 5 muster. The district court cannot be permitted to redecide the validity of the 1972 plan simply because it disagrees with the Attorney General's decision. Nor can the district court ignore the binding effect of the 1972 no-objection letter. In *Georgia* v. *United States*, this Court defined the Attorney General's Section 5 function as essentially judicial. 411 U.S. 526, 536 (1973). If the State of Mississippi had obtained a declaratory judgment from the district court in 1972, and the court had made the same determination as the Attorney General, that final judgment of the district court would forever preclude relitigation of the statutory validity of the 1972 lines. It is unthinkable that Congress intended the Attorney General's Section 5 decisions to be ever subject to controversy while those of the district court would be final. Insofar as Section 5 makes administrative and judicial review fully

interchangeable alternatives, it would be wholly arbitrary to predicate the finality of a preclearance on the State's choice of forum.

In the instant case, the res judicata effect of the last preclearance has two-fold implications. First, the plan which gave form to black voting strength as it existed at the time of the enactment of S.B. 2001 had been approved under Section 5, thus its legitimacy as a benchmark is unassailable. Secondly, insofar as the 1972 preclearance established the statutory validity of the basic configuration, that aspect of S.B. 2001 cannot be relitigated.

B. The State had no obligation to submit the 1966 redistricting plan

In its effort to establish the November 1, 1964 benchmark, the court below attached legal significance to the lack of preclearance in 1966. It was not until *Allen* v. *State Board of Elections*, 363 U.S. 544 (1969), however, three years *after* the legislation in question, that it became conceivable that a reapportionment statute would be covered by Section 5. In *United States* v. *Board of Commissioners of Sheffield*, Justice Stevens, with the Chief Justice and Justice Rehnquist, noted that "*Allen's* creative interpretation was so dramatic that it was given only prospective application." 435 U.S. 110, 145 at n. 7 (1978).[4] Whether reapportionment legislation was included in Section 5 remained sufficiently unclear in 1973 to necessitate this Court's determination of the issue in *Georgia* v. *United States*, 411 U.S. 526 (1973).

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[4] *See also* Report of the Senate Judiciary Committee on S. 1992, No. 97-417 97th Congress, 2nd Session at 120: "the *Allen* decision effected a substantial transformation of the Voting Rights Act."

Presumably, the State's "breach" of this non-existent statutory duty to submit the 1966 plan, allows the district court to review the 1966 districts and make whatever determination it wished had been made in 1966. This makeweight argument is especially unconvincing in light of the Government's failure to raise the issue until 16 years after the State's supposed omission.

III. Section 5 Does Not Authorize Federal Scrutiny Of State Voting Standards, Practices And Procedures Beyond The Temporal Boundaries Of The Change Which Activates Federal Review

The House Committee Report from 1965 described the purpose of Section 5 as follows:

> This provision is intended, by providing for judicial scrutiny of new or changed voting requirements, to ensure against the erection of new and onerous discriminatory voting barriers . . .

H.R. Rep. No. 94-196 p. 27.

This Court, commenting on the purpose of Section 5 of the Voting Rights Act has said, "[Section 5] *essentially freezes the election laws* of the covered States unless a declaratory judgment is obtained . . . *Georgia* v. *United States*, 411 U.S. at 538. (emphasis added).

The intent of Congress is plain: The Section 5 mechanism is activated only by a *change* in a covered jurisdiction's voting laws. Thus, the *authority* of the Justice Department in a Section 5 review is circumscribed by the temporal boundaries set-up by the change. Should the Attorney General wish to take issue with a plan based on its effect measured against any other standard *but* the immediately prior enactment, he must file suit in federal court insofar as Congress has not empowered the Attorney General under § 5 to review state legislative enact-

ments beyond the scope of the *change* in question. Outside the province of Section 5, the Government has the burden of proving a constitutional violation in federal court.

Likewise the scope of the district court's review is limited by the same temporal boundaries. Section 5 places the burden on the State to prove the lack of impermissible purpose and effect only as to the change which necessitates Section 5 review. On the issue of effect Section 5 simply does not require the State to prove anything more than an absence of impermissible effect between the existing law and the change. Neither the court below nor the Attorney General has jurisdiction under Section 5 to adjudicate any issue beyond the change in voting effectuated by S.B. 2001.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

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APPENDIX A

Memorandum Opinion, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

MEMORANDUM

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge*.[1]

The State of Mississippi has filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1976), seeking a declaratory judgment that the 1981 reapportionment of the State's congressional districts (S.B. 2001) "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* This matter is now before the Court after full argument on plaintiff's motion for partial summary judgment and plaintiff's motion *in*

[1] Judge Richey, the third member of the panel, did not participate.

limine and the respective oppositions thereto filed by the United States and intervening defendants.

Mississippi seeks a determination prior to trial that the nonretrogression principle announced in *Beer* v. *United States*, 425 U.S. 130 (1976), requires that the effect of the 1981 reapportionment plan must be measured by comparison with the Mississippi reapportionment plan adopted in 1972. Further, by its motion *in limine* Mississippi seeks an order "limiting the evidence on the issue of discriminatory purpose to the legislative process in 1981 which culminated in the development and enactment" of the 1981 plan. In opposition it is urged that the Court must consider in this proceeding pre-1981 evidence of the alleged continuing purpose of Mississippi to discriminate and that the retrogressive effect of the 1981 plan should be measured by comparison with apportionment plans in effect in 1964 or prior thereto.

The crux of this dispute is the claim that Mississippi has divided black voters residing in the so-called Delta Region among several different congressional districts for the purpose of preventing the election of a black to the United States Congress. The Delta Region is a distinct geographical and cultural region in the northwestern part of the State. Although black persons residing in the State comprise only 35.2 percent of the total population, the Delta historically had a high proportion of blacks and according to the most recent Census was majority black in 1980. Given the apparent prevalence of block voting in Mississippi, the United States claims that Mississippi's current apportionment scheme continues to deprive blacks of the opportunity to elect one of their own race to the House.

A brief review of the developments in Mississippi will aid understanding of our decision. The stipulated record demonstrates that since the late nineteenth century through the date of enactment of the Voting Rights Act,

the Delta Region has been contained in one congressional district despite numerous other districting changes required by changes in population or political considerations over this period. Although blacks were a potential electoral majority in the Delta district under each of these various plans, they exerted virtually no political control because of the State's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting. . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965). In 1964, only 6.7 percent of blacks in Mississippi eligible to vote were registered. As various restrictions on black registration and voting were removed, blacks in the Delta Region gained more and more voting strength.

In 1965 a suit was instituted in federal court, challenging the then-exsiting 1962 plan as violative of the one-person, one-vote formula. *Connor* v. *Johnson*, Civ. 3380 (S. D. Miss. October 19, 1965). In response to this litigation the State legislature undertook a comprehensive reapportionment of the State congressional districts. Under the plan adopted by the legislature on April 7, 1966, the Delta Region, which had a longitudinal configuration, was divided horizontally among three districts, eliminating the 59 percent black majority that then existed in the Delta Region. As a result of this reapportionment no district in the State had a majority black voting age population. This plan was submitted to the *Connor* v. *Johnson* Court, which held that the plan was not racially discriminatory and also satisfied the one-man, one-vote constitutional standard. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). Although this apportionment plan required preclearance pursuant to section 5 of the Voting Rights Act, *see McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), it was not submitted to the Attorney General for preclearance nor was it the subject of a declaratory judgment action in the United States District Court for the District of Co-

lumbia. As a result, the 1966 plan was never scrutinized under Voting Rights Act standards.[2]

Following the 1970 Census the State of Mississippi was required to adopt a new apportionment plan to reflect population changes. In broad outline, however, the State simply reenacted the 1966 plan; each of the State's five congressional districts was majority white in population. The State submitted this 1972 plan to the Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. The Attorney General did not make a factual determination as to whether the State had demonstrated that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Rather, it was simply indicated:

> The Attorney General will not object to [the 1972 plan]. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

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[2] Plaintiff's suggestion that the ruling that apportionment plans are subject to section 5 review, *see* Georgia v. United States, 411 U.S. 526 (1973), should only be applied prospectively in light of Allen v. State Board of Elections, 393 U.S. 544 (1969), is entirely without merit. Although the *Allen* Court declined to overturn elections based on various enactments affecting voting which were not clearly within the scope of section 5 prior to the Court's decision, the Court did not suggest that the enactments could be used in the future either for the purpose of conducting elections or as benchmarks against which to measure future electoral changes under section 5. Indeed, the Court specifically directed the District Courts on remand "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.* at 572.

This position was consistent with the then-policy of the Department of Justice not to make a section 5 determination in those instances where the voting change had previously been addressed by a federal district court and found to meet constitutional standards. *See Morris* v. *Gressette*, 432 U.S. 491, 497, n.8 (1977); *Georgia* v. *United States*, 411 U.S. 526, 535 n.6 (1973).

Subsequent Supreme Court decisions reveal the error of this policy. It is now clear that section 5 preclearance procedures must be followed even where there has been a federal court determination that the plan meets constitutional standards. *See McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975) (*per curiam*); *Harper* v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). (Attorney General's deference to constitutional adjudication is "fundamentally inconsistent with clearly expressed congressional intent underlying Section 5"). Indeed, it is now apparent that the *Connor* v. *Johnson* Court lacked jurisdiction to consider the constitutionality of the plan before it had been precleared pursuant to section 5. *See McDaniel* v. *Sanchez*, 452 U.S. at 153.

In 1981 Mississippi was again required to adopt a new congressional apportionment plan to reflect further population changes disclosed by the 1980 Census. Although the legislature discussed the possibility of recreating a black majority vote in the Delta district this, as well as other alternatives, was rejected. The adopted plan provides for five congressional districts with a configuration virtually identical to the 1966 and 1972 lines; each of these districts is majority white. The plan was submitted to the Attorney General for section 5 review and on March 30, 1982, a timely section 5 objection was interposed. The plan is now before this Court for section 5 review.

In April, 1982, certain black residents of the State of Mississippi, some of whom are also defendant-intervenors

in this action, filed suit in the United States District Court for the Northern District of Mississippi seekng to enjoin implementation of the 1981 plan because it had not been approved by the Attorney General or this Court. The plaintiffs also sought to enjoin implementation of the congressional districting plan adopted in 1972 on the ground that the existing districts were unconstitutionally malapportioned. After the parties had fully briefed the issues in this case but prior to oral argument the Mississippi Court issued an opinion holding the 1972 plan unconstitutional as violative of the one-man, one-vote principle and enjoined its use. The Court also enjoined implementation of the 1981 plan pending a determination by this Court that the plan does not violate the Voting Rights Act or until another redistricting plan enacted by the State of Mississippi is precleared in accordance with section 5.

Given the need promptly to establish an electoral scheme to govern imminent congressional primary and general elections and its understanding that this Court could not rule on the 1981 plan for several months, the Mississippi Court ordered into effect an interim plan for the 1982 elections. Based on evaluation of black voting strength under different voting schemes, one-man, one-vote considerations, as well as various state political factors, the Court adopted the so-called Simpson amendment, which was considered but ultimately rejected by the legislature in 1981 in favor of S.B. 2001. The Simpson amendment provides for a black majority district of 53.8 percent centered in the Delta Region. The Simpson plan remains in effect until a redistricting plan enacted by the State of Mississippi is preclared under section 5 of the Voting Rights Act.

As initially presented to the Court upon the briefs, this motion for partial summary judgment raised the issue whether the Court was required to compare the 1981 plan to the 1972 plan or, in the alternative, to the prior

plan adopted in 1966, in determining whether the 1981 plan has an impermissible retrogressive effect, or whether instead the proper benchmark for such determination was some other apportionment plan adopted prior to 1966. It is very doubtful that an apportionment plan never reviewed on the merits under section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring the possible discriminatory effect of subsequent plans. Although certain decisions appear to suggest that the existing plan is at least presumptively the appropriate benchmark, those opinions are distinguishable on their facts from the problem presented here. *See Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Furthermore, it would appear inconsistent with the intent of Congress in requiring section 5 review of every electoral change "different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, to hold that an apportionment plan that is retrogressive as compared to the plan in effect on the effective date of the Act establishes a new benchmark for section 5 review. Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing. In any event, the Court finds it unnecessary definitively to resolve these issues, at least at this time, in view of the recent order of the Three-Judge District Court for the Northern District of Mississippi.

The Court holds that whether or not the 1972 reapportionment plan (or prior 1966 plan) can serve as a benchmark, S.B. 2001 must, at a minimum, be shown not to be retrogressive relative to the plan ordered into effect by the Three-Judge Mississippi Court. In *United States* v. *Mississippi*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980), the Court held based on almost identical facts that a judicial plan ordered into

effect subsequent to the filing of a section 5 declaratory judgment action should be considered the preexisting plan and at least the initial benchmark against which to assess the effect of the statutory plan, *id.* at 582.[3] We believe that this decision stands for at least this much: a section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan. It would be entirely inconsistent with the teaching of *Beer* to suggest that the Court must accept a statutory plan that increases black voting strength to a lesser degree than a court-ordered plan in effect merely because the court-ordered plan will exist only until another plan is precleared under section 5.

On the present record, it appears that this initial inquiry may be decisive of the issue whether the 1981 plan violates the nonretrogression standard of the Voting Rights Act. Accordingly, we will defer any definitive resolution of the question whether either the 1972 or 1966 plan may serve as a benchmark pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan. If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing

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[3] We note that the Supreme Court's summary affirmance has only limited precedential value, especially given that the District Court noted in the alternative that the plan under review satisfied the nonretrogression principle when compared to the earlier 1975 plan. 490 F. Supp. at 582 n.6. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (Burger, C.J., concurring) (summary affirmance of three-judge court "affirm[s] the judgment but not necessarily the reasoning"). On the other hand, the affirmance is perhaps due added weight because the three Justices who dissented on the merits explicitly stated that the court-ordered plan was the proper benchmark. *See* 444 U.S. at 1052 (Marshall, J. dissenting).

right to seek approval of any plan under section 5 at any time must be fully recognized.

The only remaining issue is whether evidence pertaining to possible discriminatory intent should be limited to the 1981 legislative process or whether evidence of the alleged discriminatory purpose underlying prior apportionment plans and carried forward by S.B. 2001 may be considered. The motion *in limine* will be denied. The value of historical background information for the purpose of assessing present discriminatory intent is well recognized. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980). The appropriate weight, if any, to give this evidence can be determined by the Court based on a more complete legal and factual record.

Both the motion for partial summary judgment and the motion *in limine* shall be denied. An appropriate Order is filed herewith.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

ORDER

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge.*

For the reasons stated in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff's motion *in limine* is denied; and it is further

ORDERED that a status conference is set in Courtroom No. 6 at 9:00 a.m. on July 14, 1982, to set a definite schedule for any further proceedings that may be deemed appropriate.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPENDIX C

MAY 30 1972

Honorable A. F. Summer
Attorney General
State of Mississippi
The State Capitol Building
Jackson, Mississippi 39201

Dear Mr. Attorney General;

This is in response to your submission, on behalf of the State of Mississippi, of House Bill 448, the recently passed reapportionment of Mississippi's five Congressional seats. This submission was made pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.U. Miss. 1966). *affirmed*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

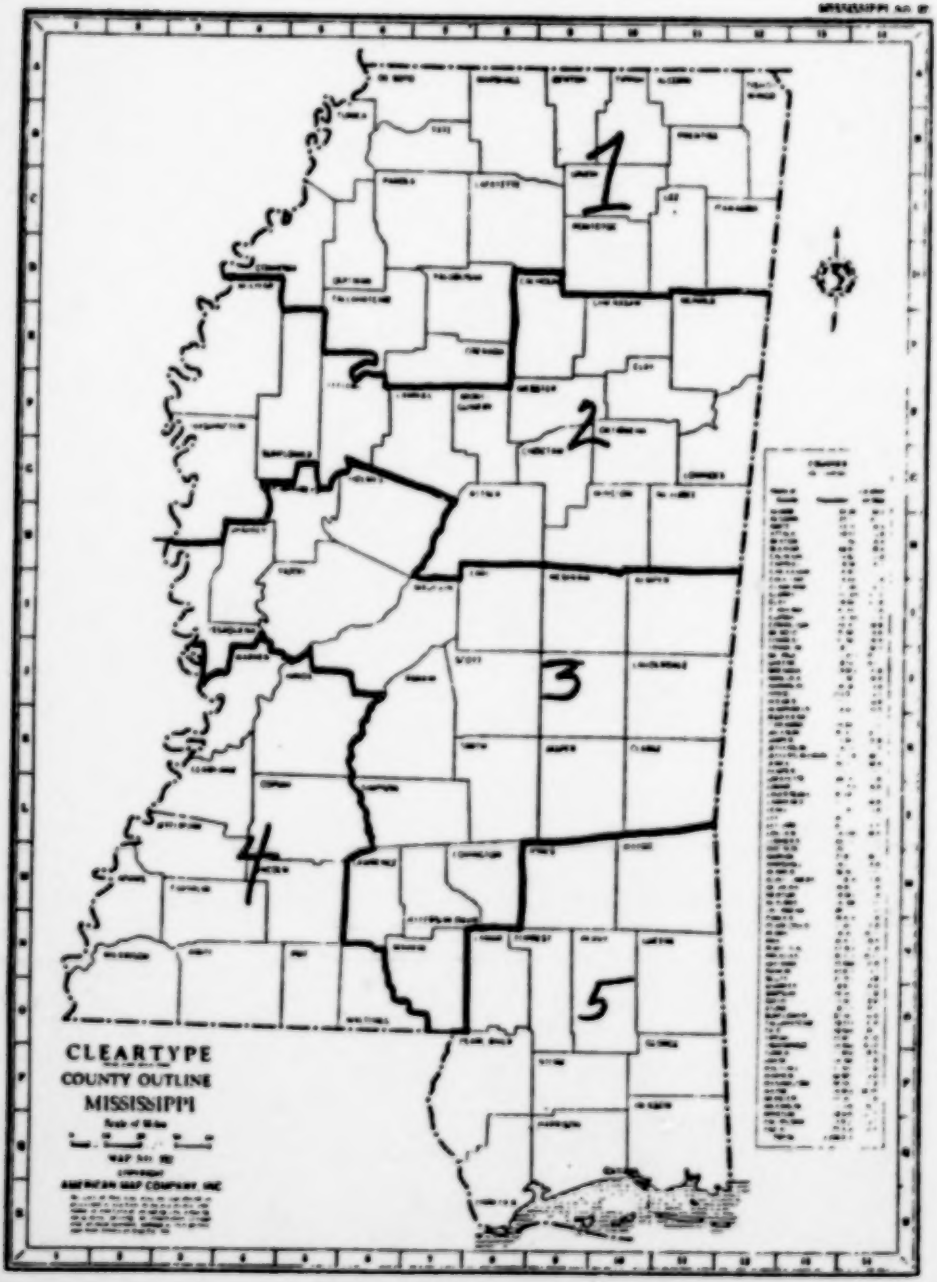
We trust that you are aware that, as Section 5 provides, our present failure to object does not bar future litigation regarding House Bill 448's Fifteenth Amendment implications before the courts. Nor should this letter be construed as an approval; of the one person, one vote implications of House Bill 448, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), because the Attorney General does not have jurisdiction under Section 5 to determine such issues.

Sincerely,

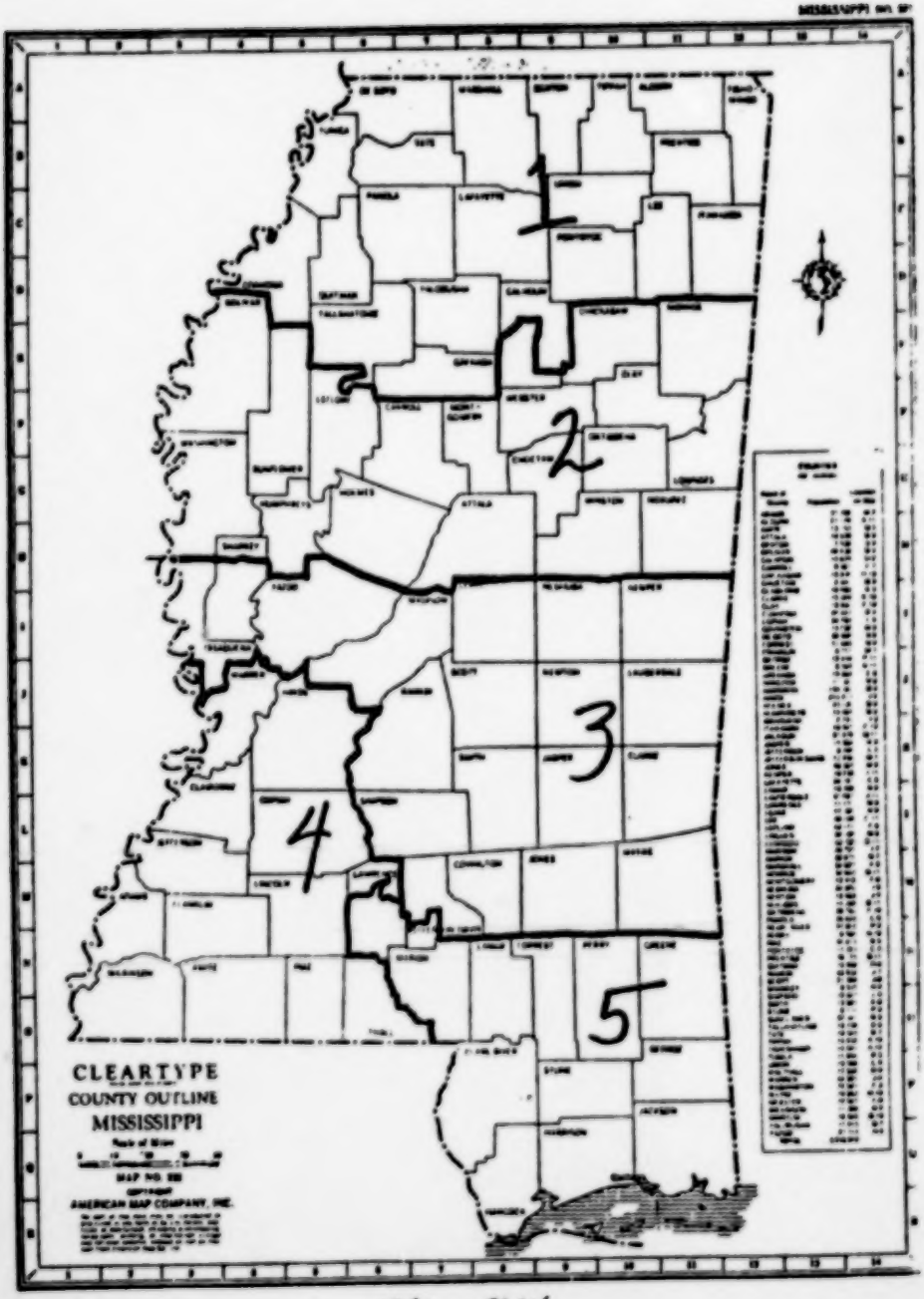
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

APPENDIX D

1966 - PLAN



1972 PLAN



1981 PLAN
(S.B. 2001)

APPENDIX E

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 11, 1982

Jerris Leonard, Esquire
Jerris Leonard & Associates
Suite 1020
900 Seventh Street. N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on November 10, 1981.

We have given careful consideration to all of the forwarded materials as well as to other information available to focus once again on the State's reapportionment of 1966 which adopted a district configuration that fragmented the Mississippi Delta area into three districts. As you know, that 1966 plan was never submitted for Section 5 preclearance. However, a federal district court, in a constitutional challenge to the plan, sustained it on the ground that plaintiffs had failed to carry their burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967).

When the State reapportioned in 1972, following the 1970 Census, the State submitted the 1972 plan to the Attorney General pursuant to Section 5. That plan essentially followed the districting configuration for the Delta areas that had been adopted in 1966. The Attorney General determined, based on

the then prevailing decisional law (*Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) that he was bound by the district court's earlier *Connor* decision to preclear the 1972 plan without undertaking an independent evaluation of it to determine whether it satisfied Section 5 requirements.

Subsequent decisions of the United States supreme Court have made it clear that any reapportionment plan enacted by a covered state must be subject to an independent review under Section 5 without regard to whatever judicial scrutiny that plan may undergo. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, Sup. Ct. No. 80-180, decided June 1, 1981. Consequently, were we to consider the 1972 plan today we would be compelled to review that plan on its merits under the purpose/effect standard of Section 5 rather than forego that analysis in deference to the district court's 1966 decision.

This raises the troublesome question with regard to the present submission as to whether the proper comparison is with the State reapportionment in 1972, which has never been tested under Section 5, with the State reapportionment in 1966, which also has never been tested under Section 5, or with the pre-1966 State reapportionment, which was in effect at the time the Voting Rights Act was adopted. In order to resolve this question in a meaningful way and on a fully informed basis, it is necessary that we receive from you additional information regarding your submission. Specifically, we request, as I discussed with you today by telephone, that you provide us with an analysis of the district or districts in the Delta area as configured in 1965, in 1966 after reapportionment, and in 1972 after reapportionment, including population statistics as determined by the 1960 census, the 1970 Census and the 1980 Census.

As soon as this information is provided to us we will undertake to complete our assessment of the current submission on

an expedited basis and will meet with you promptly to discuss the analysis provided.

Sincerely,

WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

IN THE SUPREME COURT

OF THE UNITED STATES

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF MISSISSIPPI,	)	
	)	
Appellant,	)	
	)	No. 82-540
v.	)	
	)	
WILLIAM FRENCH SMITH,	)	
	)	
Appellee.	)	

APPELLANT'S STATEMENT REGARDING STATUS OF THE CASE BELOW

Comes now the appellant, the State of Missippi, and by counsel offers the following statement regarding the status of the case below:

1. On April 7, 1982, the State of Mississippi filed a motion in the Court below asking that Mississippi v. Smith No. 82-0956, from which this interlocutory appeal is taken, be dismissed without prejudice.

2. The State was compelled to move for dismissal because of the expense of the litigation. Trial was to commence on April 18, 1983 and on April 7 this interlocutory appeal was still pending before the Court. Thus the State would have had to proceed to trial and attempt to prove that its legislatively-enacted Congressional redistricting plan, S.B. 2001, did not retrogress from the court-ordered plan implemented 10 months after the Legislature acted. It was apparent that the State could not prevail under the rule of law established by the district court, nor could it afford the expense of trying the case twice, were the district court's ruling overturned by this Court at a later date.

3. The district court's order setting forth the terms and conditions of dismissal without prejudice is attached.

Respectfully submitted,

Jerris Leonard

Jerris Leonard
Jerris Leonard and Associates
900 17th Street, N.W.
Suite 1020
Washington, D.C. 20006

Counsel of Record for Appellants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

STATE OF MISSISSIPPI, Plaintiff, v. WILLIAM FRENCH SMITH, Defendant; HENRY J. KIRKSEY, ET AL., Intervening Defendants.	)	Civil Action No. 82-0956

FILED

APR 11 1983

JAMES F. DAVEY, Clerk

ORDER

Plaintiff's motion to dismiss without prejudice is granted subject to the following terms and conditions which the Court deems proper based on review of the record as a whole and in the light of comments of counsel in open court this day:

(1) This action shall be reinstated before this Court with the existing record intact (a) if plaintiff has first demonstrated to the satisfaction of this Court, after notice to the Attorney General and the intervening defendants, that there has been a significant change in relevant legal circumstances or in relevant facts underlying this action or (b) on motion by the Attorney General or by intervening defendants, after notice for good cause shown;

(2) The Attorney General may apply for costs and intervening defendants may file a claim for attorneys' fees

and costs on or before May 9, 1983, and plaintiff shall respond to such submissions no later than June 6, 1983.

SO ORDERED.

United States Circuit Judge

United States District Judge

United States District Judge

April 9th, 1983.

CERTIFICATE OF SERVICE

I, Kathleen Heenan, certify that I have mailed first-class this 27th day of April, 1983 true and correct copies of the foregoing Statement Regarding Status of the Case Below to the following:

The Honorable Rex Lee
Solicitor General of the United States
10th and Constitution Avenue, N.W. #5143
Washington, D.C. 20530

Mr. Paul Hancock
Voting Rights Section
United States Department of Justice
320 First Street, N.W.
Washington, D.C. 20530

Mr. Frank Parker
Lawyers Committee for Civil Rights Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

Kathleen Heenan

Office-Supreme Court, U.S.
FILED
NOV 3 [redacted]
ALEXANDER L. STEVAS,
CLERK

No. 82-540

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the denial of a motion for partial summary judgment by a three-judge district court in a preclearance action under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, is appealable to this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-540

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

Under Rule 16 of the Rules of this Court, the Attorney General moves to dismiss this appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-9a) is reported at 541 F. Supp. 1329.

JURISDICTION

The district court entered its order on June 28, 1982. The notice of appeal was filed on July 28, 1982. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.[1]

STATEMENT

On April 7, 1982, the State of Mississippi filed the instant action in the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act

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[1]For further discussion of the jurisdictional question presented by this appeal see pages 3-6, *infra*.

of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that its legislatively-enacted Congressional redistricting plan, S.B. 2001, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. A three-judge court was convened pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284(a).

In accordance with this Court's decision in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the State attempted to prove that the redistricting plan embodied in S.B. 2001 did not have an impermissible effect under Section 5, because it did not constitute "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" when compared with the districting plan in effect since 1972. To this end the State filed a motion for partial summary judgment, asking the district court to decide whether the 1972 plan would serve as the appropriate benchmark against which to measure the redistricting plan in S.B. 2001.

The district court denied the motion (J.S. App. 1a-9a). It held that the proper benchmark for determining retrogression was a court-ordered plan that is presently in effect in Mississippi.[2] The district court concluded its memorandum opinion by noting that "[i]f [the State] is of the view that it can establish that the 1981 plan is not retrogressive in

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[2]The court-ordered plan was the result of a suit filed by black residents of Mississippi in the United States District Court for the District of Mississippi, seeking to enjoin implementation of S.B. 2001, because it had not been precleared by either the Attorney General or the United States District Court for the District of Columbia as required by Section 5, 42 U.S.C. 1973c (J.S. App. 6a). Because it was not possible to preclear S.B. 2001 in time for the then upcoming primary election and the preexisting districting plan was concededly malapportioned in light of the 1980 census, the Mississippi district court ordered into effect an interim plan for the 1982 election. See *Jordan* v. *Winter*, 541 F. Supp. 1135, 1141-1142 (N.D. Miss. 1982), appeals pending, Nos. 82-233 and 82-413.

comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date" (J.S. App. 8a). The State took no further action in the district court; it merely filed this appeal.

ARGUMENT

The jurisdiction of the Court over this appeal is governed by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which requires all declaratory judgment actions seeking preclearance to be "determined" by a three-judge district court and provides that "any appeal shall lie to the Supreme Court." Section 5 does not by its terms limit this Court's appellate review to final judgments. Nonetheless, we submit that the denial of a motion for partial summary judgment appealed from here by the State lacks the finality implicitly required by Section 5, and accordingly, this appeal should be dismissed for want of jurisdiction.

a. Although the appealability portion of Section 5 is relatively unusual in that it lacks any explicit reference to a final judgment, that omission by itself does not justify concluding that all interlocutory orders by the district court in a preclearance suit are appealable to this Court. This Court previously has interpreted 28 U.S.C. 1254(2), which also provides for appeal to this Court without mentioning the need for a final judgment when a court of appeals declares a state statute to be unconstitutional, as allowing an appeal only from final judgments or decrees. *Slaker* v. *O'Connor*, 278 U.S. 188, 189 (1929) (interpreting the predecessor provision to Section 1254(2)). See also *South Carolina Electric & Gas Co* v. *Flemming*, 351 U.S. 901 (1956); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920); *Martinez* v. *International Banking Corp.*, 220 U.S. 214, 223-224 (1911).[3] Thus, when

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[3]Although that interpretation has been questioned by this Court, it has never been overruled. See *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 82-83 (1958). See also *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 (1975).

Congress adopted Section 5 and provided merely for appeal to this Court, it properly could have assumed based on *Slaker* that no explicit reference to a final judgment was required.

Moreover, it is inconceivable that Congress intended every decision by the district court in a Section 5 action seeking preclearance to be subject to appellate review by this Court. Without a limitation to final judgments, every discovery order or other proced l ruling by the district court would be subject to an interlocutory appeal to this Court, because the statute's scope otherwise includes "any appeal."[4] The imposition of so onerous a burden on this Court's otherwise narrowly confined mandatory appellate jurisdiction ought not to be implied lightly from ambiguous statutory language.

Nothing in the legislative history of Section 5 of the Voting Rights Act indicates that Congress intended all interlocutory orders to be appealable. The House and Senate Reports merely indicate general dissatisfaction with the ability of the federal courts to keep pace with racially motivated voting changes adopted by some cities and states in response to court orders and therefore appeal immediately to the Supreme Court was provided to help expedite the preclearance process. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965); S. Rep. No. 162 (Pt. 3), 89th

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[4]In this respect Section 5 is significantly broader than 28 U.S.C. 1254(2), which limits the right to appeal to the federal questions presented. Indeed, it seems likely that the broad reference to "any appeal" in Section 5 was intended to make clear that all issues arising out of a final judgment in a Voting Rights Act case were properly a matter for the Supreme Court to review, thereby avoiding some of the confusion in other statutes regarding which issues in a particular case are reviewable in which court. See *Tidewater Oil Co.* v. *United States*, 409 U.S. 151 (1972) (interpreting Section 2 of the Expediting Act, 15 U.S.C. (1970 ed.) 29). See also *NAACP* v. *New York*, 413 U.S. 345, 354-355 (1973); note 5, *infra*.

Cong., 1st Sess. 6-7 (1965). Expeditious disposition of voting rights litigation would hardly be accomplished by allowing piecemeal review of the district court's interlocutory orders. The legislative history thus provides no indication that Congress intended to modify the traditional final judgment rule when it adopted Section 5. Accordingly, we submit that the provision in 42 U.S.C. 1973c for appeal to this Court must be limited to final judgments—or to orders "granting or denying * * * an interlocutory or permanent injunction" within the meaning of 28 U.S.C. 1253, which by its terms applies to any civil action required to be heard by a three-judge district court.[5]

b. This Court previously has recognized that denial of a motion for summary judgment is generally not a final order for purposes of appeal. See *Switzerland Cheese Association, Inc.* v. *Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84-85 (1981). Surely, the rule should be no more permissive for appeals to this Court than for appeals to the courts of appeals. And the district court's order in this case clearly was not final in any sense.[6] The court merely decided which

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[5]Nothing in *NAACP* v. *New York, supra*, is to the contrary. In that case this Court construed the language of Section 4(a) of the Voting Rights Act, 42 U.S.C. 1973b(a) (authorizing direct appeals to the Supreme Court in terms identical to Section 5) to permit an unsuccessful intervenor in a Section 4 suit to appeal to the Supreme Court. 413 U.S. at 355. In that case, however, a final judgment had been entered and the only issue was whether the unsuccessful intervenors could rely upon the expansive reference to "any appeals" to allow them to appeal directly to this Court the denial of their motion to intervene or whether they would have to seek review first in the court of appeals. *Ibid.* See note 4, *supra*.

[6]Obviously, the decision on the State's summary judgment motion is not a collateral order; the issue goes to the heart of the merits and accordingly is fully reviewable on appeal from a final judgment. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

previously employed congressional districting plan would serve as the benchmark at the forthcoming trial for deciding whether S.B. 2001 is retrogressive.

The State's right to litigate that issue in this Court is in no way jeopardized by a failure to obtain review at this time. If the district court finally concludes that S.B. 2001 is impermissibly retrogressive by employing a standard that the State believes is erroneous, that issue can be raised on appeal from the final decision of the district court.[7] Certainly, the State cannot show "that its opportunity for meaningful review will perish unless immediate appeal is permitted." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377-378 (1981). Accordingly, there is no basis for this Court to deviate from its established practice of declining to review a denial of a motion for summary judgment.[8]

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[7]Presumably the State must anticipate making some showing on the retrogression issue even if the court-ordered plan is the appropriate benchmark. Otherwise, it is incomprehensible why the State would file an appeal in this Court immediately instead of obtaining a final judgment from the district court.

[8]Since in our view the Court has no jurisdiction over the State's appeal, we have not addressed the question presented in the State's jurisdictional statement. If the Court requests, we will, of course, address that issue in a supplemental filing.

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No. 82-540

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

STATE OF MISSISSIPPI,

Appellant,

v.

WILLIAM FRENCH SMITH, Attorney General, *et al.*,

and

HENRY J. KIRKSEY, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

MOTION TO DISMISS OR AFFIRM ON BEHALF OF HENRY J. KIRKSEY, ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-540

STATE OF MISSISSIPPI,

Appellant,

v.

WILLIAM FRENCH SMITH, Attorney General, *et al.*,

and

HENRY J. KIRKSEY, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO DISMISS OR AFFIRM ON BEHALF OF HENRY J. KIRKSEY, ET AL.

Henry J. Kirksey, et al., defendants-intervenors below, move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal for lack of jurisdiction of an appeal from an interlocutory order or, in the alternative, to affirm for the reason that the questions presented are so unsubstantial as not to need further argument.[1]

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[1] This motion to dismiss or affirm is being filed on behalf of state Senator Henry J. Kirksey, a black member of the Mississippi Legislature, and Owen H. Brooks, Sarah H. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, black residents and registered voters of the Mississippi Delta who are adversely affected by the 1981 "least change" congressional redistricting plan, and who were granted leave to intervene in this action by the District Court. Order Granting Leave to Intervene of April 16, 1982.

OPINION BELOW

The District Court's decision is now reported at 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court).

STATEMENT OF THE CASE

This is an interlocutory appeal from an interlocutory decision of a three-judge District Court denying the State of Mississippi's motion for partial summary judgment and motion *in limine* to exclude evidence of purposeful discrimination in Mississippi congressional redistricting.

From the late nineteenth century until 1966, the Mississippi Legislature preserved the Delta region of the state intact within a single congressional district, despite numerous revisions of other districts required by changes in population or political considerations over this period. 541 F. Supp. at 1330. The Delta, in the northwest portion of Mississippi, is a distinct geographical and cultural region which historically has been heavily black. *Id.* Although black citizens had a potential electoral majority in this historic Delta district, they had no electoral influence prior to 1965 because of Mississippi's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965).

Then, in 1966, just as Mississippi's discriminatory literacy test and poll tax were outlawed by the Voting Rights Act of 1965, and just as blacks were beginning to register and vote, the state legislature redrew the boundaries of Mississippi's five congressional districts. The majority black Delta district, the lines of which ran north and south, was carved up among three new districts, the boundaries of which ran horizontally across the state from east to west, thus dismembering the black population concentration in the Delta and diluting black voting strength. All five new districts were majority white in voting age population. 541 F. Supp. at 1331.

Both congressional redistricting plans enacted by the Mississippi Legislature since 1966, the 1972 plan and the 1981 "least change" plan, followed this same basic pattern of fragmenting the black population concentration in the Delta and diluting black voting strength. News accounts of these redistrictings, which Mississippi has stipulated to be the only available accounts of the legislative debate on these plans,[2] show that these plans were racially motivated.[3]

In 1966 a Mississippi three-judge District Court, addressing primarily the question of whether the 1966 plan met one-person, one-vote requirements, ruled that black voter plaintiffs in that case failed to sustain their claim that the 1966 plan was racially motivated, finding only that "the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports." *Connor* v. *Johnson*, 279 F. Supp. 619, 623-24 (S.D. Miss. 1966), *aff'd mem.*, 386 U.S. 483 (1967). The District Court did not specifically make a determination that the 1966 plan did not have a racially discriminatory effect,[4] and did not apply the Section 5, Voting Rights Act, standard under which the state would have had the burden of proving that the plan was not discriminatory in purpose or effect.[5] Although *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), which held that Section 5 reaches any change which alters a covered state's election law "in even a minor way" (393 U.S. at 566) and which specifically addressed reapportionment plans (*id.* at 564-65, 569), held that such a plan was covered by Section 5, the 1966 con-

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[2] First Set of Stipulations, filed April 30, 1982, p. 8, ¶ 32.

[3] This evidence is summarized in *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, pp. 16-23.

[4] The statement in the Jurisdictional Statement, p. 3, that the *Connor* court found that the 1966 plan did not have a racially discriminatory effect is erroneous.

[5] *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980).

gressional redistricting plan was never submitted for Section 5 review by either the Attorney General or the District Court for the District of Columbia. 541 F. Supp. at 1331.

Subsequent decisions of this court have made it clear that the *Connor* court lacked jurisdiction to approve the 1966 plan because legislatively-enacted reapportionment plans are not "effective as laws until and unless cleared pursuant to § 5," and District Courts err in deciding constitutional challenges to state laws based upon claims of racial discrimination prior to Section 5 preclearance. *Connor* v. *Waller*, 421 U.S. 656 (1975).[6]

The 1972 plan, which also divided the Delta and created five majority white districts, was submitted to the Attorney General for Section 5 preclearance. Under the Justice Department policy then in effect, the Attorney General deferred to the decision of the *Connor* court approving the 1966 plan and did not object to the 1972 plan. 541 F. Supp. at 1331. The Attorney General did not apply the proper Section 5 standard to determine whether the state had met its burden of proving that the 1972 plan was not enacted for a discriminatory purpose and did not have a discriminatory effect. *Id.* Subsequent decisions of this Court have established that the 1972 plan was reviewed by the Attorney General under an erroneous legal standard, and that Section 5 preclearance rules are applicable even where a local District Court exceeds its jurisdiction and determines that the plan meets constitutional standards. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, *supra*.

In 1981 the Mississippi Legislature rejected proposals for restoring a majority black Delta district, and adhered to its discriminatory policy of splitting up the Delta and

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[6] See also, *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 836-37 (1982); *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645 (1977).

creating five majority white districts. 541 F. Supp. at 1332. When the 1981 plan was submitted for Section 5 preclearance, the Attorney General entered a timely Section 5 objection. The Attorney General found that while the state was under no obligation to maximize minority voting strength, the Justice Department had received complaints that alternate plans creating a majority black district "were rejected for racially discriminatory reasons," and the fragmentation and dilution of black voting strength in the Delta "suggests to us an unnecessary retrogression in the position of black voters in Mississippi." [7]

Following the Attorney General's Section 5 objection, a three-judge District Court in Mississippi enjoined implementation of the 1981 "least change" plan because it had not been precleared under Section 5, found the preexisting congressional districts unconstitutionally malapportioned, and ordered into effect an interim court-ordered congressional redistricting plan. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeals pending*, Nos. 82-233, 82-413. The court-ordered plan puts the Delta counties back together in a single district, District 2, which is 53.77% black in population, *id.* at 1141. In the August 17, 1982 Democratic primary, a black candidate, state Rep. Robert G. Clark, defeated three white candidates to win the Democratic nomination for the U.S. House of Representatives in that district.[8] Clark faces a white Republican nominee in the November general election.[9]

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[7] Section 5 objection letter from William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division, U.S. Department of Justice to Jerris Leonard, March 30, 1982. This Section 5 objection letter is not included in the appendix to the Jurisdictional Statement in this appeal, but may be found in *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, Appendix B, pp. 25a-29a.

[8] (Jackson) *Clarion-Ledger*, August 18, 1982, p. 1A.

[9] *Id.*

The State of Mississippi filed this action on April 7, 1982, to overturn the Attorney General's Section 5 objection to the Mississippi Legislature's 1981 "least change" plan. Mississippi seeks a declaratory judgment that this plan, Miss. Laws, 1981 Extra. Sess., ch. 8 (hereinafter sometimes cited as "least change" plan), was not enacted for a racially discriminatory purpose and would not have a racially discriminatory effect. Mississippi then filed two motions: (1) a motion for partial summary judgment seeking a declaration from the District Court for the District of Columbia that either the 1972 plan or the 1966 plan should be used as the benchmark for measuring whether the 1981 plan was retrogressive of black voting strength, and therefore the 1981 plan should be found not to have a discriminatory effect under *Beer* v. *United States*, 425 U.S. 130, 141 (1976);[10] and (2) a motion *in limine* seeking an interlocutory ruling from the District Court that any proof of racially discriminatory purpose behind the 1966 and 1972 legislatively-enacted congressional redistricting plans, upon which the 1981 plan was based, should be excluded from evidence at trial. The state did not seek summary judgment on the issue of whether the 1981 plan was motivated by a racially discriminatory purpose.

The District Court denied both motions. The court held that because neither the 1966 plan nor the 1972 plan had been subjected to proper Section 5 review based on Section 5 statutory standards,

> It is very doubtful that an apportionment plan never reviewed on the merits under Section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for

[10] "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

> the purpose of measuring the possible discriminatory effect of subsequent plans.
>
> * * *
>
> Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing.

541 F. Supp. at 1332-33. The court then applied the teachings of *Mississippi* v. *United States*, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), to hold that for purposes of determining whether the "least change" plan has a discriminatory effect, the *Jordon* v. *Winter* court-ordered plan must now be considered the existing plan against which the "least change" plan should be measured to determine whether or not it has a retrogressive effect. But the District Court deferred "any definitive resolution" of the question of whether either the 1972 or the 1966 plans could be used as benchmarks for measuring the effect of the 1981 plan "pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan." 541 F. Supp. at 1333.

> If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing right to seek approval of any plan under Section 5 at any time must be fully recognized.

Id. No such trial has yet been held.

The District Court also denied Mississippi's evidentiary motion for the reason that the historical background and sequence of events leading up to the enactment of the 1981 plan, under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977), are relevant to assessing whether the 1981 plan was enacted for a discriminatory purpose. *Id.*

ARGUMENT

I. THIS COURT LACKS JURISDICTION OF THIS APPEAL BECAUSE A DISTRICT COURT ORDER DENYING A MOTION FOR PARTIAL SUMMARY JUDGMENT IS NOT AN APPEALABLE ORDER.

Since *Goldstein* v. *Cox*, 396 U.S. 471 (1970), and *Switzerland Cheese Assn.* v. *E. Horne's Market*, 385 U.S. 23 (1966), it has been well established that this Court lacks appellate jurisdiction over denials of motions for summary judgment. See 6 J. Moore, *Moore's Federal Practice*, ¶ 56.21[2], pp. 56-1275-86 (1982). In numerous cases, this Court has stated that its jurisdiction of appeals from three-judge District Courts "is to be narrowly construed since 'any loose construction of the requirements of [the three-judge court act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein* v. *Cox*, *supra*, 396 U.S. at 478, *quoting Phillips* v. *United States*, 312 U.S. 246, 250 (1941); see *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 561-62. Mississippi's appeal in this case violates the congressional policy against piecemeal appeals, and if allowed would open "a floodgate" of review of pretrial orders. *Switzerland Cheese Assn.* v. *E. Horne's Market*, *supra*, 385 U.S. at 24.

Where a summary adjudication is made in a civil action over which this Court has appellate jurisdiction by direct appeal from the District Court, appealability of the order is governed by statutes applicable to direct appeal. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); 6 J. Moore, *Moore's Federal Practice*, *supra*, ¶ 56.21 [1.—1], p. 56-1265. No statute authorizes this appeal. It is not authorized by 28 U.S.C. §§ 1253, 1291, or 1292 (a) or (b) or Rule 54(b), Fed. R. Civ. P., because the decision below is not a final decision, the District Court did not grant or deny a preliminary or permanent injunction (no injunctive relief has been sought in this declaratory judgment action), and the District Court was

not requested to certify this appeal as involving a controlling question of law.

The only possible exception to this rule, that carved out in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), clearly is not applicable here. Mississippi can make no claim (and does not in its Jurisdictional Statement) that the issues presented in this appeal are severable from the main action, or that the state's rights would be denied or substantially prejudiced if this appeal were denied. The District Court in its ruling did not resolve the factual issues of whether or not the 1981 "least change" plan has a retrogressive effect compared with the court-ordered plan or the 1972 or 1966 plans, and promised the state a trial on these issues "at the earliest possible date." 541 F. Supp. at 1333. The District Court has made it clear that the issues presented in this appeal will be fully preserved to the state pending final adjudication, and once the District Court has rendered final judgment, these issues will be ripe for determination by this Court on any subsequent appeal. There are also issues which the plaintiff has not yet presented to the District Court for resolution, such as the issue of whether plaintiff can demonstrate that the "least change" plan was not enacted for a racially discriminatory purpose. All these issues remain in the District Court, in the first instance, for final determination.

The only case cited by appellant, *NAACP* v. *New York*, 413 U.S. 345 (1973), is inapposite. There the District Court entered an order denying appellants' motion to intervene, and entered a summary judgment, agreed to by the United States, allowing New York City to bail out from under Section 5 and the other temporary enforcement provisions of the Voting Rights Act. Unlike this case, the denial of intervention there forever cut off any claims that the intervenors might have in resisting New York City's bailout action.

For similar reasons, the denial of the motion *in limine* also is a nonappealable order. The appeal is not authorized by any statute, and allowing this appeal would open up a floodgate of immediate interlocutory appeals by Section 5 plaintiffs from any District Court ruling—including rulings rendered during a trial—on any evidentiary issue which went against the plaintiff.

For these reasons, this Court should dismiss this interlocutory appeal for lack of jurisdiction.

II. ALTERNATIVELY, THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW.

The District Court's refusal to defer to the 1966 District Court decision in *Connor* is consistent with this Court's numerous decisions holding that "a District Court's conclusion that a reapportionment plan proposed by a covered jurisdiction complies with constitutional requirements is not a substitute for § 5 review." *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 150 n. 31, discussing *United States* v. *Board of Supervisors of Warren County, Mississippi*, *supra*; also, *Hathorn* v. *Lavorn*, *supra*; *Connor* v. *Finch*, *supra*; *Connor* v. *Waller*, *supra*. Based on these decisions of this Court, the Attorney General's 1972 non-objection letter also was based on a patently erroneous legal standard, and therefore is not binding on the District Court for the District of Columbia in reviewing the 1981 "least change" plan. The 1972 non-objection presents a unique situation which is not likely to recur, and therefore does not merit plenary consideration by this Court. The Justice Department policy of deferring to local District Court determinations of constitutionality in Section 5 review has long since been abolished, and the Attorney General has now recog-

nized his statutory responsibility to review Section 5 submissions on their merits.[11]

Morris v. *Gressette*, 432 U.S. 490 (1977), is inapplicable here. There, as distinguished from this case, minority voters sought direct judicial review of the Attorney General's failure to object to a Section 5 submission, and that decision was based entirely on this Court's view that Congress did not intend that the Attorney General's Section 5 preclearance period should be extended beyond the time period provided in the statute. 432 U.S. at 504-05. There is nothing in that decision which holds that the District Court for the District of Columbia, in a *de novo* proceeding brought by a covered jurisdiction, is bound by a prior Section 5 determination issued by the Attorney General ten years earlier under a facially erroneous legal interpretation which has since been repudiated by numerous decisions of this Court.

The District Court's determination to use the court-ordered plan as the present benchmark for determining discriminatory effect in the 1981 "least change" plan was controlled by *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980). This Court in *Beer* v. *United States*, *supra*, construed Section 5 to protect "*present* levels of voting effectiveness for the black population" from being diminished. 425 U.S. at 141 n.12, *quoting City of Richmond* v. *United States*, 422 U.S. 358, 388 (Brennan, J., dissenting). Since the court-ordered plan is the plan presently in effect for Mississippi congressional elections, that is the benchmark by which any retrogressive effect should be measured. *Mississippi* v. *United States* also holds that whether or not a new plan is retrogressive of existing levels of black voting strength

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[11] See Section 5 objection letter, *Brooks* v. *Winter*, *supra*, Jurisdictional Statement, Appendix B, pp. 25a-29a.

should not be determined on the basis of prior plans tainted by racial discrimination, in that case, the prior legislative reapportionment plans which "had failed to meet constitutional requirements and had been marked by the racially discriminatory use of multi-member districts." 490 F. Supp. at 575. Here, as the Attorney General determined in his Section 5 objection, the 1972 and 1966 Mississippi congressional redistricting plans had gerrymandered black voting strength by slicing up the heavily black Delta area.

The facts of this case are even stronger than those presented in *Mississippi* v. *United States*. In that case the court-ordered plan used by the District Court as the benchmark for measuring present retrogression had never been used in an election. Here, the court-ordered plan has already been used in the August 17 party primaries, and is scheduled to be used in the November 2 general election. The state's position that the 1972 and 1966 plans should be used to determine discriminatory effect would truly be retrogressive, because it would deprive black state Rep. Robert G. Clark of his Democratic primary victory, and, if he wins in the general election, would oust from office the first black member of Congress elected from Mississippi since 1886. Whether or not Mississippi was justified in relying on its legal interpretation that perpetuating the 1966 gerrymander or the 1972 gerrymander would assure Section 5 preclearance is immaterial. Whatever weight the District Court may give this reliance interest in determining whether or not the 1981 plan was motivated by a discriminatory purpose, it surely is not relevant to a determination whether the "least change" plan has the present discriminatory effect prohibited by Section 5 as construed in *Beer*.

Appellants' contentions fail to present a substantial question meriting plenary review by this Court.

CONCLUSION

For the reasons stated herein, this Court should dismiss this appeal for lack of jurisdiction, or alternatively, affirm.

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No. 82-540

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSISSIPPI, *Appellant*,

v.

WILLIAM FRENCH SMITH, *Appellee*
and HENRY J. KIRKSEY, *et al.*, *Appellees*.

On Appeal From The United States District Court For The District Of Columbia

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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Appellant, the State of Mississippi, by its attorneys and pursuant to Supreme Court Rule 16.4 respectfully requests the Court to deny the motions of the Appellees to dismiss, and to grant the Appellant's request for an order noting probable jurisdiction of this appeal.

The Jurisdictional Language Of Section 5 Encompasses A Direct Appeal From An Order Denying A Motion For Summary Judgment Where The Order Decides A Governing Issuing Of Law

A. Section 5 of the Voting Rights Act provides that "any appeal shall be to the Supreme Court." 42 U.S.C. § 1973c. In interpreting the parallel language in Section 4 of the Act, 42 U.S.C. § 1973b, this Court noted that the jurisdictional provision "does not incorporate or refer to

§ 1253" and that it therefore should be interpreted in light of "the broader purport of Congress" in enacting the Voting Rights Act. *N.A.A.C.P.* v. *New York*, 413 U.S. 345, 356 (1973).

The clear intent of Congress in drafting the unrestricted "any appeal" provisions of the Act was to expedite litigation so that "voting restraints on account of race or color should be removed as quickly as possible." 413 U.S. at 354. Moreover, the Section 5 mechanism, insofar as it prohibits a sovereign state from implementing its own legislation unless and until the legislation is approved by a federal court, is so unprecedented that the covered states' right to uniform and swift adjudication must be scrupulously guarded. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

In *Allen*, the Court commented on the unique nature of Section 5 litigation.

> In drafting § 5 Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. *Allen* at 563.

The *Allen* Court did not read the limiting provisions of other three-judge court statutes into Section 5. "The requirement [of three judges] applies to [Section 5] suits for declaratory judgment as well as for injunctions. And the three-judge courts do not appear to be limited to constitutional issues. *The Supreme Court's resulting direct appellate jurisdiction under 1973c appears equally unrestricted.*" Robert L. Stern and Eugene Gressman, *Supreme Court Practice* (5th ed. 1978) p. 22-23. (emphasis added.)

The Solicitor General's argument that a denial of summary judgment is not final and hence unappealable entirely misses the mark. In *NAACP* v. *New York*, the Court painstakingly distinguished Section 4, and concomitantly the jurisdictionally identical Section 5, from other three-judge court statutes which do in fact require a final judgment.

> Congress . . . provided in that [the Voting Rights] Act that "any appeal" in a § 4(a) three-judge proceeding shall be to this Court. This contrasts with the language in the earlier theretofore existing statute providing for an appeal here only "from the final judgment" of the three-judge court. § 1972(g). 413 U.S. at 355.

Furthermore, the Solicitor General's suggestion, that absent final judgment only orders granting or denying injunctions under Section 5 are appealable, was considered and rejected by the Court in *NAACP* v. *New York*. The Court supported its broad reading of the Voting Rights Act provision by contrasting it with 28 U.S.C. § 1253. 413 U.S. at 356.

> Section 4(a) does not incorporate or refer to § 1253. The former relates to "any appeal;" the latter speaks only of "any party." The difference is obvious and the broader purport of Congress under § 4(a) is manifest.

B. For the proposition that "this Court has recognized that a denial of a motion for summary judgment is generally not a final order for purpose of appeal" the Solicitor General cites *Switzerland Cheese Association, Inc.* v. *Horne's Market, Inc.*, 385 U.S. 23 (1966). (Motion to Dismiss, at 5). Whatever merit the argument may have, that such an appeal under Section 5 must be dismissed for lack of finality, it is clearly inapplicable to the present case. In *Switzerland Cheese*, the Court specifical-

ly stated that a summary judgment motion denied on the grounds that there exist "unresolved issues of fact" is generally unappealable because such an order "does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25.

In the present case, however, the State moved for summary judgment on the issue of effect, in order to resolve a fundamental question of law. That legal issue must be determined before the state, the party with the burden of proof, can formulate its case. The district court's order does not, as in *Switzerland Cheese*, merely rule that the case should go to trial, it fashions a new legal standard by which to evaluate impermissible effect under Section 5 of the Voting Rights Act.

The implementation of Congress' intent that Section 5 litigation be expeditious and uniform, requires that the governing legal standards be determined prior to trial. Should the Court decide this case in favor of the state, trial on the issue of impermissible effect will be unnecessary. The plain language of Section 5 and judicial economy argue for the disposition of this issue by the Supreme Court prior to trial.

CONCLUSION

For these reasons, this Court should deny the Appellees' Motions to Dismiss and enter an order noting probably jurisdiction of this appeal.

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